United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1955

To be argued by
DANIEL J. PYKETT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1955

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT WILNER, RICHARD BELANGER
and ROBERT VISSA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

DANIEL J. PYKETT,
LAWRENCE S. FELD,
Assistant United States Attorneys, Of Counsel.

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Preliminary Statement

Robert Wilner, Richard Belanger and Robert Vissa appeal from judgments of conviction entered on December 2, 1974 and on July 12, 1974, in the United States District Court for the Southern District of New York following a fourteen day trial before the Honorable Morris E. Lasker, United States District Judge, and a jury.

Indictment 73 Cr. 1102, filed on December 7, 1973, charged appellants and eight others in Count One with conspiracy to distribute and possess with intent to distribute controlled substances and in Count Two with possessing with intent to distribute approximately 500 pounds of marijuana in the Southern District of New York in violation of Title 21 United States Code, Sections 812, 841(a)(1), 841(b)(1)(B) and 846.

Trial commenced on May 6, 1974 and concluded on May 24, 1974, when the jury found defendants Wilner, Belanger and Vissa guilty on both counts. Defendants Steven Smith, Nicholas Calabro, Gary Stephen, and Paul Stephen were found not guilty.*

On July 12, 1974 Belanger was sentenced to concurrent one year terms of imprisonment on each of Counts One and Two to be followed by a special parole term of two years. Wilner was sentenced on December 2, 1974 to a one year term of imprisonment on Count One, execution of which was suspended, and was placed on three years probation on Count Two. On July 12, 1974 Vissa was sentenced to concurrent one year terms of imprisonment on each of Counts One and Two, the execution of six months of the sentence suspended, and was placed on probation for six months with a two year term of special parole to follow.

Appellants are at liberty pending this appeal.

Statement of Facts

The Government's Case

In August 1971 Richard Thurlow, a mate on a charter fishing boat in Miami, Florida, sailed to Jamaica, West Indies, with four other people, including defendants Dominic Mecca and Paul Stephen. In Jamaica they purchased approximately five hundred pounds of marijuana which they

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* Defendant Dominic Mecca was severed and was tried and convicted in September 1974 and sentenced to one year imprisonment by Judge Lasker. Defendant Richard Palmer pled guilty to Count One on May 6, 1974 was fined $2,500 and placed on probation for three years. Defendants James Adams and Anthony Coviello had not been arrested at the time of trial. Coviello, who was subsequently arrested, is awaiting trial. Adams remains a fugitive.

brought back to Miami where they were met by defendant Gary Stephen who assisted them in unloading the marijuana into the trunks of cars. The marijuana was subsequently sold in the United States (Tr. 25-52).* As more fully explained, *infra* at page 6, Judge Lasker subsequently instructed the jury to disregard the evidence relating to the August 1971 trip.

Approximately fifteen months later Mecca, Wilner and Belanger began establishing an offshore charter fishing business, the purpose of which was to smuggle marijuana from Jamaica to the United States under the guise of a legitimate fishing operation. They incorporated the business under the name Air Seas Charter, Inc. and purchased a 49 foot Cigarette racing boat which they rigged with a tuna tower. (Tr. 55-56) Richard Thurlow was hired to supervise the construction of the boat and later to serve as its captain (Tr. 54). When the bills began to mount up, plans were made for a trip to Jamaica to purchase marijuana so it could be sold at a profit to cover expenses (Tr. 60). Wilner, who had been taking flying lessons and who owned an airplane, recruited defendant Palmer, his flight instructor, and together with Belanger, Mecca and Thurlow they searched for and found, a deserted island (Williams Island) with a landing strip in the Bahamas (Tr. 1343). Plans were then made to fly five to seven hundred pounds of marijuana from Jamaica to the deserted island where a boat operated by Thurlow would pick it up. Since the boat Thurlow was converting was not in operating condition, a new boat was purchased with funds contributed by defendant James Adams (Tr. 73-74). Palmer, who then was cooperating with Customs officials, informed a Customs agent of the plans that were being made and on two occasions taped conversations among Wilner, Belanger and Mecca as they discussed the operation. These tapes were

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* "Tr." refers to pages in the trial transcript; "Br." refers to the brief of the specified defendant.

played for the jury (Tr. 1367, 1377). In March 1973 Palmer and Wilner flew to Jamaica where they were met by Mecca and Belanger, who helped load the marijuana on the plane (Tr. 1388). The marijuana was then flown to the deserted island and left under some bushes. Palmer and Wilner flew back to Miami where they informed Thurlow of their success. Palmer also informed the Customs officials (Tr. 1392) and when Thurlow and Steven Smith, another deckhand whom Thurlow had recruited, went to the island by boat to pick up the marijuana, they were arrested and the marijuana was seized by United States and Bahamian officials (Tr. 97-98). Thurlow and Smith were subsequently tried and convicted in the Bahamas.

The operations of Air Seas Charter Inc. continued in spite of the unsuccessful trip. Palmer, however, did not continue to provide the Customs officials with information about the group's activities. In May 1973 Palmer and Robert Vissa flew to Jamaica where they were met by Dominic Mecca (Tr. 1411-12). Approximately 500 pounds of marijuana was loaded on the plane and subsequently dropped from the plane to a boat and brought into Miami. The marijuana was then driven to New York in two cars operated by Anthony Coviello and Gerald Mitchell. (Tr. 670-675) The possession of this 500 pounds of marijuana in the Southern District of New York is the subject of the second count of the indictment. Two additional trips were made in June and August 1973 involving several of the named defendants. The method of operation was basically the same as in the previous trips. In June, however, Mitchell was arrested on the New Jersey Turnpike as he was transporting approximately 255 pounds of marijuana by car from Miami to New York.

The Defense Case

None of the defendants presented any evidence.

ARGUMENT

POINT I

The District Court did not amend the indictment, and the exclusion of evidence which the District Court found irrelevant did not prejudice any defendant.

On this appeal, appellants Wilner and Vissa contend that Judge Lasker committed reversible error by instructing the jury to disregard the incriminating evidence concerning the August 1971 and August 1973 trips to Jamaica and by striking the first overt act of the conspiracy count relating to the August 1971 trip. The argument advanced is that the latter ruling, far from achieving its clear purpose of protecting the defendants' right to a fair trial, amounted to an improper amendment of the indictment. Alternatively, it is claimed that the exclusion of the evidence prejudiced the defendants, since it precluded them from arguing to the jury that they were entitled to an acquittal because the proof showed multiple conspiracies instead of the single conspiracy charged. (Wilner Br. at 11, 14-15; Vissa Br. at 7). Vissa further argues that the evidence in any event established multiple conspiracies and that the trial judge should have dismissed the conspiracy count on the authority of *Kotteakos* v. *United States*, 328 U.S. 750 (1946). These contentions, we submit, are wholly without merit.

A. The District Court's Ruling.

At the close of the Government's case, the defendants, relying on *Kotteakos*, moved to dismiss the conspiracy count on the ground that there was a material variance

between the proof, which allegedly established multiple conspiracies, and the charge, which alleged a single conspiracy. The District Judge denied the motions (Tr. 1816-17).

Contrary to Vissa's claim (Vissa Br. at 6), the District Court did not find that the evidence established three separate conspiracies. Indeed, Judge Lasker stated: "I conclude that *Kotteakos* is not applicable to this case." (Tr. 1816). Judge Lasker also concluded, however, that the evidence relating to the events of August 1971 and August 1973 was "insufficient to put before the jury as part of the conspiracy alleged in this indictment" (Tr. 1816). Having decided to exclude this evidence from the jury's consideration, the District Judge instructed the jury before summations and at the beginning of his charge to disregard this evidence, which he told the jury was stricken from the record (Tr. 1840, 2106). He also instructed the jury that overt act number 1 relating to the evenfs of August 1971 was stricken from the indictment (Tr. 2106, 2132). Overt act number 1 was physically removed from the copy of the indictment given to the jury during its deliberations.

B. The Indictment was not Amended.

It is black letter law that an indictment cannot be amended except by resubmission of the case to a grand jury. *Ex parte Bain,* 121 U.S. 1 (1887); *Russell* v. *United States,* 369 U.S. 749, 770 (1962); *United States* v. *Norris,* 281 U.S. 619 (1930). Over the years, however, the Supreme Court and the Courts of Appeal have in fact approved a variety of changes in indictments. *United States* v. *Cirami,* 510 F.2d 69, 72 (2d Cir. 1975). Thus, "a useless averment" of an indictment may be ignored. *Ford* v. *United States,* 273 U.S. 593, 602 (1927), and "courts have regularly permitted juries to disregard as surplusage language in an indictment not essential to allegations of the offense charged. *United States* v. *Cirami, supra,* 510 F.2d at 72.

Withdrawal of part of the charge does not constitute an amendment of the indictment as long as nothing is added to the indictment and the remaining allegations charge an offense. *Salinger* v. *United States*, 272 U.S. 542, 548-49 (1926); *United States* v. *Musgrave*, 483 F.2d 327, 338 (5th Cir.), *cert. denied*, 414 U.S. 1023 (1973).

In *United States* v. *Colasurdo*, 453 F.2d 585 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972), this Court held that it was not improper for the trial judge to have stricken certain allegations in a conspiracy count because eliminating such allegations "narrowed, rather than broadened, the reach of the conspiracy count" and "the portion of the manifold scheme stricken was unnecessary to the commission of the basic fraud charged." *Id.* at 590. See also *Overstreet* v. *United States*, 321 F.2d 459, 461 (5th Cir. 1963), *cert. denied*, 376 U.S. 919 (1964); *United States* v. *Griffin*, 463 F.2d 177, 178 (10th Cir.), *cert. denied*, 409 U.S. 988 (1972); *Thomas* v. *United States*, 398 F.2d 531, 539 (5th Cir. 1967); *Alley* v. *United States*, 426 F.2d 877, 879 (8th Cir. 1970).

In the present case, the only allegation of the indictment eliminated from the jury's consideration was 1 of 16 overt acts alleged in the conspiracy count. Nothing was thereby added to the offense charged. The remaining allegations indisputably alleged an offense and indeed precisely the same offense which the grand jury considered and upon which they returned the indictment. Here, as in *Colasurdo*, the trial judge's ruling merely "narrowed, rather than broadened, the reach of the conspiracy count." 453 F.2d at 590. Under these circumstances, the indictment was not impermissibly amended, and no error was committed.

C. The Defendants Were Not Prejudiced by the District Court's Ruling.

At the end of the Government's case, Judge Lasker was faced with the issue of deciding whether to exclude the evidence relating to the events of August 1971 and August

1973. Judge Lasker concluded that the challenged evidence was too remote from the issues to be considered by the jury. In other words, he found the evidence to be irrelevant. Accordingly, he decided to strike the evidence and instruct the jury to disregard it. This ruling, we submit, was well within the sound discretion of the District Court.*

Wilner and Vissa argue that they were materially prejudiced by the District Court's ruling because it prevented them from asserting as a defense to Count One that the proof showed multiple conspiracies. No authority is cited by either of them to support this argument. Properly analyzed, the argument is totally devoid of merit.

It is, of course, true that "[w]hether a scheme is one conspiracy or several conspiracies is *primarily* a jury question." *United States* v. *Rodriguez*, 509 F.2d 1342, 1348 (5th Cir. 1975) (emphasis added); *United States* v. *Dardi*, 330 F.2d 316, 327 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964); *United States* v. *Crosby*, 294 F.2d 928, 945 (2d Cir. 1961), *cert denied* as *Mittelman* v. *United States*, 368 U.S. 984 (1962). Under this principle, it would appear that in a case where only separate and distinct conspiracies are shown, a defendant may permissibly argue to a jury the prosecution proved multiple conspiracies instead of the single conspiracy charged and that therefore the jury should

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* While at this point the issue may be academic, the Government submits that the stricken evidence was admissible as part of the conspiracy, *e.g. United States* v. *Sperling*, 506 F.2d 1325 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3474 (U.S., March 3, 1975); *United States* v. *Mallah*, 503 F.2d 971, *cert. denied*, 43 U.S.L.W. 3515 (U.S., March 25, 1975); *United States* v. *Tramunti*, Dkt. No. 74-1550 (2d Cir., March 7, 1975), slip op. 2107, or, alternatively, as relevant proof of the existence and aim of the conspiracy. *United States* v. *Cohen*, 489 F.2d 945, 949 (2d Cir. 1973); *United States* v. *De Sapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *United States* v. *Bonanno*, 467 F.2d 14, 17 (9th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973).

return a verdict of not guilty on the conspiracy count. In the present case, had the evidence relating to the events of August 1971 and August 1973 remained in the case, it might have been improper to refuse to allow the defense to make such an argument, assuming *arguendo* that the record would then properly be viewed as showing only separate and distinct conspiracies. But, since that evidence was *excluded* on the ground of remoteness *i.e.* irrelevancy, there was no basis for asserting the multiple conspiracies defense on the evidence before the jury. We know of no authority which permits a defendant to mount a defense based upon evidence, which the District Court has found to be irrelevant and has excluded from the jury's consideration.

Appellants do not demonstrate on this appeal that the excluded evidence was proof of any relevant fact in the case. Rather, their claim appears to be that they were entitled to rely on that evidence even though it was irrelevant and, indeed, precisely because it was irrelevant. Under such circumstances, we fail to understand how they can assert that they should therefore receive a new trial. Had Judge Lasker not excluded this evidence, there undoubtedly would have been an outcry on this appeal about multiple conspiracies, prejudice and spill-over effect from that evidence. Having been protected from the possibility of that kind of prejudice, they cannot be heard to complain about the ruling.

In any event, it is clear that the issue of whether a single conspiracy or multiple conspiracies had been proved was placed squarely before the jury by the District Court's charge (Tr. 2127). And, indeed, trial counsel for Wilner in his summation made the multiple conspiracies argument to the jury even after the first limiting instruction was given (Tr. 1840, 2047). Under the defense view of the case, the proof, even without the excluded evidence, apparently permitted the inference that multiple conspiracies had been established. However, as the Government contended and

the jury found, the proof also warranted a finding that there was a single conspiracy, as charged in the indictment.

A major fallacy inherent in appellants' argument is the unarticulated premise that if the jury found more than one conspiracy, they were required, as a matter of law, to return a verdict of not guilty. While that may have been the effect of the District Court's instruction (Tr. 2127), the charge given was more favorable to the defendants than that to which they were entitled. See *United States* v. *Sperling, supra,* 506 F.2d at 1341; *United States* v. *Sisca,* 503 F.2d 1337, 1345 (2d Cir.), *cert. denied,* 43 U.S.L.W. 3281 (U.S., Nov. 12, 1974). Under this Court's recent decision in *United States* v. *Tramunti,* Dkt. No. 74-1550 (2d Cir., March 7, 1975), slip op. 2107 at 2140, however, it is clear that even if multiple conspiracies are established by the evidence, the jury is still entitled to find "that *one* of the proven conspiracies was the single conspiracy charged." (emphasis in original).

> "Here, however, where there was proof of the single, overall conspiracy, the fact that there also was evidence of other conspiracies or that the jury could have found two *major* conspiracies does not require a mandatory charge of acquittal." (*Id.* at 2141; emphasis in original).*

In the present case, it cannot be rationally disputed that the evidence was sufficient to permit a finding by the jury of the single, overall conspiracy charged. Thus, even if the excluded evidence had been allowed to remain in the record for the jury's consideration and even if they might have concluded that the events of August 1971 and August 1973 constituted one or more separate conspiracies, under the *Tramunti* rule they still could properly have found the

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* *Tramunti* completely disposes of Vissa's further argument that Judge Lasker should have dismissed Count One at the close of the Government's case in chief.

defendants guilty of the conspiracy count, since "*one* of the proven conspiracies was the single conspiracy charged." In sum, in this case the defense of multiple conspiracies, which appellants assert could more effectively have been made if Judge Lasker had not excluded the evidence, was really no defense at all, since it would not have legally entitled them to an acquittal.

POINT II

The evidence was more than sufficient to support Belanger's conviction on both counts and the trial court's instructions were correct.

Belanger argues that his conviction under both counts should be reversed because the evidence was insufficient to support the guilty verdict on Count Two under *Pinkerton* v. *United States*, 328 U.S. 640 (1945) and because the trial judge's instructions on the conspiracy count were inadequate. Neither claim has merit.

A. The Evidence Against Belanger

The proof at trial revealed a continuing conspiracy to smuggle large quantities of marijuana into the United States from Jamaica for sale and distribution in this country. There was evidence from which the jury could have found that Belanger understood that the March 1973 attempt to smuggle marijuana into the United States, in which he plainly participated, was part of a continuing, ongoing marijuana smuggling venture. First, Belanger dealt directly with the core members of the conspiracy, *i.e.* Thurlow, Palmer, Wilner, Mecca and Adams. In fact, he was one of the officers in the Air-Sea Charter Corporation (GX 7). Second, during the tape recorded conversation of February 22, 1973, Mecca, in discussing the planned March trip and how much marijuana the plane could safely carry, remarked to Belanger, Wilner and Palmer: "We don't really

have to push ourselves to the limit, *especially the first time.* We'll take a safe load." (emphasis added). Further evidence that Belanger knew that this was a continuing conspiracy is contained in Thurlow's testimony about the purchase of marijuana by Belanger and Mecca for the March trip. (Tr. 86-88) Initially Thurlow, Mecca and Belanger went to Jamaica to make arrangements to purchase hashish being produced by Adams. Although the hashish operation was to produce fifty to seventy-five pounds a day, at the time Mecca and Belanger went to Jamaica to arrange the first shipment, not enough had been produced to insure a full plane load. Belanger, therefore, suggested that they make an immediate trip with marijuana. (Tr. 88) The jury could have inferred from this testimony that Belanger contemplated participating in a large scale hashish smuggling operation wtih his co-conspirators.

Furthermore, after the March 1973 trip, Mitchell met with Belanger and Mecca who informed them of the arrest of Thurlow and Smith on Williams Island and further declared that "we were going to make another trip." (Tr. 655).

This proof, together with the evidence against Belanger recited at 12-13 of his brief, was amply sufficient to permit the jury to find that Belanger understood that in joining this conspiracy, he was linking himself to a highly sophisticated on-going venture to import and sell marijuana on a commercial basis. Once membership in such a conspiracy is established, under familiar principles it is presumed to continue absent affirmative evidence of withdrawal, of which here there was none. Mere cessation of activity is not enough to constitute a withdrawal from the conspiracy. The burden of proving withdrawal rested squarely on Belanger. *United States* v. *Borelli,* 336 F.2d 376 (2d Cir. 1964), *cert. denied,* 379 U.S. 960 (1965); *United States* v. *Consolidated Laundries Corp.,* 291 F.2d 563, 573 (2d Cir. 1961); *United States* v. *Compagna,* 146 F.2d 524, 527 (2d Cir. 1944), *cert. denied,* 324 U.S. 867 (1945).

Clearly, then, the jury could have properly found, as it did, that Belanger continued to be a member of the conspiracy during May, 1973 and thereafter. Since the substantive offense which occurred in May, 1973 was committed during the course of and in furtherance of the conspiracy and was unquestionably a reasonably foreseeable act, Belanger's liability for the substantive offense charged in Count Two is fully supported by *Pinkerton*.

B. The Trial Court's Instructions were Correct

Belanger's contention that Judge Lasker's charge failed to focus the jury's attention on the scope of his agreement is wholly unsupported by the record.

First, Judge Lasker carefully instructed the jury that "guilt is personal," that the case against each defendant "stands or falls on the proof or lack of proof of the charges against that particular defendant and not somebody else" and that "the guilt or innocence of a defendant must be determined beyond a reasonable doubt solely on the evidence against him." (Tr. 2119).

In explaining the essential elements of the crime of conspiracy to the jury, the District Judge stated:

> "[Y]ou must find that the defendant whose guilt or innocence you are considering at that time knowingly and wilfully associated himself with the conspiracy or joined it." (Tr. 2121).

Judge Lasker explained in detail to the jury how they should determine the element of membership in the conspiracy as follows:

> "Let us talk about this second element, that is, membership in the conspiracy, individual membership in the conspiracy.

You cannot find Mr. X guilty of count I unless you find that Mr. X knowingly joined the conspiracy.

Let me be more specific for you. If you conclude that the conspiracy charged in this indictment existed, you must determine whether the defendant whose case you are considering was a member or became a member, whether he participated in the conspiracy with knowledge of its unlawful purpose and in furtherance of its unlawful objectives.

To find a defendant's membership in a conspiracy you must find that he knowingly and intentionally participated in it. Thus, mere knowledge by a defendant of the existence of a conspiracy or of any illegal act on the part of another alleged co-conspirator or mere association with one or more of the co-conspirators is not sufficient in itself to establish membership. The government must establish beyond a reasonable doubt that the defendant under question was aware of the basic purposes and objects of the conspiracy, and he entered into it with a specific criminal intent and that was with the purpose to violate the law.

So if a defendant with an understanding of the unlawful character of the conspiracy intentionally engages, advises or assists for the purposes of furthering it, then he becomes a knowing and wilful participant or conspirator.

Whether or not a defendant was a member of the conspiracy or joined the conspiracy must be determined—I believe I may have said this before but I will stress it again—on the evidence as to his own actions, his own conduct, his own statements and declarations, his own connection with the acts and conduct of the other alleged co-conspirators. (Tr. 2127-29; emphasis added).

Judge Lasker's instructions fully complied with this Court's decision in *United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). See *United States* v. *Sperling*, *supra*, 506 F.2d at 1341; *United States* v. *Bynum*, 485 F.2d 490, 497-98 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974). As we have previously indicated, the instruction on whether the proof showed single or multiple conspiracies (Tr. 2126-27) was more favorable to the defendants than that to which they were entitled. *United States* v. *Sperling*, *supra*; *United States* v. *Tramunti*, *supra*. Finally, the *Pinkerton* instruction (Tr. 2142) was entirely correct. See *United States* v. *Carroll*, 510 F.2d 507, 508-09 (2d Cir. 1975).

POINT III

The prosecutor's summation did not deprive the defendants of a fair trial.

Belanger and Vissa contend that the prosecutor's summation contained remarks designed to inflame the passions of the jury and had the effect of denying them their right to a fair trial. The contention is wholly without merit.

Belanger asserts that it was objectionable for the prosecutor to characterize the defendants' roles in the conspiratorial scheme as directors, officers or employees of a corporation (Tr. 2098). The challenged remark, however, was a perfectly permissible response to the argument made by one of the defense attorneys who stated in his summation:

> "Weeks later there is a meeting, I called it the board of directors meeting, and at this meeting the master of ceremonies, or the chairman of the board is saying 'You will do this, you will do that, you will do the other thing' . . ." (Tr. 1883).

The prosecutor's response to this argument was completely justified. *Lawn* v. *United States*, 355 U.S. 339, 360 n.15 (1958); *United States* v. *Santana*, 485 F.2d 365, 370-71 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *United States* v. *La Sorsa*, 480 F.2d 522, 525-26 (2d Cir. 1973), *cert. denied*, 414 U.S. 855 (1973).

Furthermore, the record fully supports the conclusion that Air-Sea Charter, Inc. was a corporation formed ostensibly to conduct a charter fishing business, but, in actuality, served as a "front" for the illegal smuggling operation. Appellants Wilner, and Belanger and co-defendant Mecca outwardly ran this company. Co-conspirators Mitchell and Thurlow and co-defendant Smith were employees of the corporation. To equate their position in the corporation with their roles in the conspiracy was completely proper. The corporation was one of the means used to effectuate the conspiracy. The prosecutor here did no more than marshall the inferences that the evidence supported. *United States* v. *White*, 486 F.2d 204, 207 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974); see *United States* v. *DeFillo*, 257 F.2d 835, 840 (2d Cir. 1958), *cert. denied*, 359 U.S. 915 (1959).*

The second challenged remark is Government counsel's statement near the close of his summation:

> "Members of the jury, the case will be yours shortly. You took an oath to well and truly try this case without fear, favor, prejudice or sympathy. Yours is a different job. The problems of drugs in this community need no amplification, not only in this community but in this country. We are dealing here with a very serious case. Every case is serious.

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* It is important to note that when objection was made below to this statement by the prosecutor, the District Judge concluded that the remark was a "beautiful" response to the argument of defense counsel and "fair comment" (Tr. 2159).

> But there is a lot of marijuana and a lot of money involved in these bags. And soon it is going to be up to you." (Tr. 2102-03).

This remark, we submit, in the context of the record before the jury was not improper. In *United States* v. *Ramos*, 268 F.2d 878, 880 (2d Cir. 1959), this Court observed:

> "[W]e think it not improper for Government counsel in the prosecution of such a case, at least within reasonable limitations, to emphasize the importance of the case by calling attention to the unsavory nature and the social consequences of illicit traffic in narcotics—consequences far more serious than those flowing, for instance, from illicit traffic in lottery tickets or in untaxed liquor."

See also *Chatman* v. *United States*, 411 F.2d 1139, 1142 (9th Cir. 1969).

The next comment, which is said to have been improper, followed immediately after the foregoing:

> "Thurlow did his time, Mitchell did his time, Palmer is going to get sentenced in a few weeks. How about the rest of them?
>
> Ladies and gentlemen, if you let them walk out of here, they'll be laughing all the way to Williams Island." (Tr. 2103).

While it may have been injudicious, this last bit of rhetoric hardly warrants the grant of a new trial. *United States* v. *Stead*, 422 F.2d 183, 184 (8th Cir.), *cert. denied*, 397 U.S. 1180 (1970); *cf. United States* v. *Bell*, 498 F.2d 887, 889 (7th Cir. 1974); *United States* v. *Delay*, 500 F.2d 1360, 1367 (8th Cir. 1974). Judge Lasker's observations on

the tone and quality of the prosecutor's summation are especially pertinent here:

> "I would have preferred that there had been no reference to the narcotics . . . , but I believe that I emphasized to the jury the fact that they should disregard what the subject matter of the indictment was, and in any event I didn't find Mr. Truebner's remark prejudicial, although I thought it was perhaps a little poorly chosen.
>
> "I think it is only fair to the government for me to observe, in case an appellate judge reads what I am now saying, that I felt that Mr. Truebner's summation was made in a very calm, dispassionate tone and that that is something which must be taken into consideration by the trial judge in reaching a decision on these matters." (Tr. 2159-60).*

Fifty years ago, in *Di Carlo* v. *United States*, 6 F.2d 364, 368 (2d Cir.), *cert. denied*, 268 U.S. 706 (1924) Judge Learned Hand articulated the proper approach to be taken in cases challenging the propriety of the prosecutor's summation. Speaking for this Court, Judge Hand in that case concluded that there had been no abuse in the comments of the United States Attorney who called upon the jury "to

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* At the trial's outset, before the opening statements, the District Court instructed the jury that statements by the attorneys do not constitute evidence and that they were to base their decision solely on the evidence. (Tr. 3-4). Prior to summations the District Court again reminded the jury of the non-evidentiary nature of counsel's statements. (Tr. 1839).

In his charge to the jury, Judge Lasker instructed that the jurors were not to be swayed by sympathy or prejudice (Tr. 2107) and instructed them that the subject matter of the case (marijuana) had nothing to do with their deliberations (Tr. 2107). Throughout the charge the District Court reminded the jury to decide the case based solely on the evidence (Tr. 2111, 2115, 2119, 2145).

put an end to the rule of the 'dagger and the stiletto', to the 'invisible power behind these defendants' ":

> "While, of course, we recognize that the prosecution is by custom more rigidly limited than the defense, we must decline to assimilate its position to that of either judge or jury, or to confine a prosecuting attorney to an impartial statement of the evidence. He is an advocate, and it is entirely proper for him as earnestly as he can to persuade the jury of the truth of his side, of which he ought to be thoroughly convinced before he begins at all. To shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice; it is to deny what has always been an accepted incident of jury trials except in those jurisdictions where any serious execution of the criminal law has yielded to a ghostly phantom of the innocent man falsely convicted." *Id.* at 368.

The prosecutor in this case indulged in far less "oratorical emphasis" than that which Judge Hand approved of in *Di Carlo.* But, even if his remark is deemed improper, in this case, given the overwhelming evidence against appellants, and the fact that the remark came at the end of an otherwise "calm and dispassionate" summation delivered at the conclusion of a relatively long and hard fought trial, it is perfectly clear that "a reversal would be an immoderate penalty." *United States* v. *Lotsch,* 102 F.2d 35, 37 (2d Cir.), *cert. denied,* 307 U.S. 622 (1939).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

DANIEL J. PYKETT,
LAWRENCE S. FELD,
Assistant United States Attorneys, Of Counsel.

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DANIEL J. Pykett being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 2nd day of May, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

1. William J. Gallagher Esq
The Legal Aid Society
Federal Defender Services Unit
509 United States Court House
Foley Square
New York, New York 10007
2. Thomas J. O'Brien Esq
2 Pennsylvania Plaza
New York New York, 10001
3. LaRossa Shargel & Fischetti, Esqs
522 Fifth Ave.
New York, New York, 10036

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Daniel J Pykett

Sworn to before me this
2nd day of May, 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977